

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 17, 2007

RICKY BARNETT V. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2005-A-410 Steve R. Dozier, Judge

No. M2006-02243-CCA-R3-PC - Filed August 20, 2007

Petitioner pled guilty to two counts of child rape and one count of child abuse. His effective sentence is twenty-five years, twenty-two years to be served concurrently for each child rape and three years for child abuse to be served consecutively to the twenty-two years. Within a year of his guilty plea, Petitioner filed a petition for post-conviction relief arguing that his trial counsel was ineffective and, therefore, his plea was not entered knowingly, intelligently and voluntarily. Petitioner argued that his trial counsel was ineffective for: (1) not adequately explaining the nature and consequences of his guilty plea; (2) not adequately investigating the facts of the Petitioner's case; (3) not adequately consulting with him prior to entering his plea; and (4) not having Petitioner undergo a mental health screening. Following a full hearing, the post-conviction court denied the petition. After a thorough review of the record, we affirm the denial of the petition.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J. and JAMES CURWOOD WITT, JR., J., joined.

J. Chase Gober, Nashville, Tennessee, for the appellant, Ricky L. Burnett.

Robert E. Cooper, Jr., Attorney General & Reporter; Leslie E. Price, Assistant Attorney General; Victor S. Johnson, District Attorney General; and Brian K. Holmgren, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

On January 12, 2005, Petitioner stayed home with his girlfriend's children while she went to work. The children did not go to school that day because everyone had gotten up late. At some point, B.H.¹, the six-year-old daughter of Petitioner's girlfriend, called her mother to tell her that Petitioner had tried to rape her. Her mother immediately returned home, questioned B.H. in a separate room and confronted Petitioner. The child's mother threw Petitioner out of her house. Petitioner was arrested later that day by the police as he made suicidal threats. Petitioner confessed to the police that he had engaged in both digital-vaginal penetration and penile-vaginal penetration. He also slapped B.H. while he was in the process of raping her.

On February 25, 2005, the Davidson County Grand Jury indicted Petitioner on two counts of child rape and one count of child abuse stemming from the incident which occurred on January 12, 2005. Petitioner pled guilty to the charges on June 23, 2005. As a result of his guilty pleas, Petitioner's sentence was set at twenty-two years for each child rape conviction to be served concurrently at 100%, and three years for his child abuse conviction to be served consecutively to his child rape convictions at 30% as a Range I Standard Offender. His effective sentence was twenty-five years.

On May 25, 2006, Petitioner filed a *pro se* Petition for Post-conviction relief. On June 2, 2006, the post-conviction court appointed an attorney for Petitioner. Petitioner filed an Amended Petition for Post-conviction Relief on August 2, 2006. The petition argued that Petitioner's guilty plea was not made voluntarily, understandingly and knowingly because he was denied effective assistance of counsel.

Post-conviction Hearing

On September 22, 2006, the post-conviction court held a hearing on the petition. Petitioner testified at the post-conviction hearing. He stated that he was arrested on January 12, 2005, and pled guilty in June of 2005. He saw his attorney the second day he was in jail. When she came to see him, Petitioner was in the Suicide Cell. He remained there for twenty-four hours. After he was released into the general population, he was prescribed medication. He had not been diagnosed with any mental health issue prior to his arrest. He had never taken any medication for treatment of a mental health issue, but was using alcohol, marijuana and Xanax on a daily basis at the time of his arrest. Petitioner stated that he did not see the discovery in his case prior to pleading guilty. However, he then admitted that, prior to the entry of his plea, he watched a videotape of his statement to police in which he admitted to the crimes. He then repeated that he had not seen "the paperwork" evidence before his plea. Petitioner did not request a mental health evaluation and did

¹It is the policy of this Court to refer to minor victims by their initials.

not discuss such an evaluation with trial counsel. Although Petitioner continued to take some sort of medication, he still did not know what his diagnosis was. He understood that it was a mental health diagnosis. Petitioner stated that he did see all the discovery after he pled guilty and that he would not have pled guilty had he seen this evidence. Petitioner stated that the physical evidence did not match the interviews of the victim. Petitioner stated he would have preferred to go to trial because he did not rape the victim according to the physical evidence, and he would have attempted to have his admission to the police suppressed. Petitioner also stated that he did not know the range of sentence to which he was exposed. He also stated that he informed trial counsel he was intoxicated when he made his statement to the police. Petitioner admitted to more than one conversation with trial counsel. He stated that she told him he was guilty.

On cross-examination, Petitioner stated that he pled guilty because he was told he was guilty. When asked if he was actually guilty, he stated, "In a way, yes, but not of all charges." Petitioner admitted that trial counsel explained all the elements of each crime with which he was charged and what the prosecutor would have to prove. Petitioner stated that he did admit to the police that he had penetrated the victim with both his fingers and his penis, but at the time of the hearing, did not believe that he had actually done both those things. He testified that when he was home with the children and the victim called her mother, B.H. did not tell her mother that Petitioner raped her, but instead that he was being mean to her. Petitioner did admit that when his girlfriend confronted him about the rape, Petitioner told her it was true. He also admitted that after she kicked him out of the house, he threatened to stab himself with a knife, and when the police approached him, he told them that he had raped his daughter. Petitioner admitted that when the police interviewed him, he told them he placed his fingers in the victim's vagina and tried to put his penis inside her vagina. He also told the police that the victim was screaming throughout the episode. He denied that he told the police he grabbed the victim by her arms and her ankles but did agree that he told them he slapped her. Petitioner admitted that he told the police at the beginning of the interview that he was of sound mind. Petitioner stated that trial counsel reviewed the interview tape with him but stated that she did not review any other evidence such as medical or DNA findings with him. Petitioner stated that trial counsel went over the plea form with him and discussed the elements of the crimes. She asked him if he wanted to go to trial or enter a guilty plea, and Petitioner stated he told her he wanted to plead guilty. Trial counsel had discussed his options with him and informed him of the amount of time he was potentially facing. Petitioner admitted that he thought the guilty plea was his best option at the time. When asked if he thought he got a "raw deal", the Petitioner replied that he thought it could have come out better.

Trial counsel also testified at the hearing. She stated that she found Petitioner to be competent throughout her representation of him, except for their first meeting during the twenty-four hours he was in the Suicide Cell. At that time, she found that he was despondent, but by the day of the preliminary hearing, he was more alert. She and Petitioner talked about his case on several occasions. She did not meet with him many times because Petitioner's case seemed to be open and shut. There were statements of several people to whom he had confessed before he got to the police. There was physical evidence of the rape included in a medical report. Trial counsel remembered reviewing Petitioner's interview with the police and assumed she would have filed a motion to

suppress if she had thought there were a basis to suppress. Trial counsel testified that Petitioner made admissions other than to the police, including the victim's mother, patrons at a bar, and an emergency service such as 911. Trial counsel also stated that there was other corroborating evidence, such as B.H.'s brother's statement, physical evidence from a medical examination and a bruise on B.H.'s face, as well as statements made by the victim. Trial counsel assumed she discussed the enhancement of Petitioner's sentence based on his criminal record. She also would have had him evaluated for competency if there were even a close call that he was not competent.

Trial counsel also testified that in child sex cases she does not send discovery to her clients when they are incarcerated because she does not want other prisoners to have access to that material. She usually takes a copy of the materials with her to review with her client. It was possible that he did not get to review the material in as much detail as he has since he has obtained his file. Trial counsel would not have reviewed the videotaped interview with Petitioner and withheld the other evidence from him.

In an order filed September 27, 2006, the post-conviction court denied the petition. Petitioner filed a timely notice of appeal.

ANALYSIS

Standard of Review

The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). During our review of the issue raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the post-conviction court's findings unless the evidence in the record preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not reweigh or re-evaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. *See State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). However, the post-conviction court's conclusions of law are reviewed under a purely *de novo* standard with no presumption of correctness. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

On appeal, Petitioner argues that the post-conviction court erred in denying his petition because his guilty plea was not entered knowingly, voluntarily and intelligently because he was afforded ineffective assistance of counsel. When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, the petitioner bears the burden of showing that (a) the services rendered by trial counsel were deficient and (b) that the deficient performance was prejudicial. *See Powers v. State*, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). "Because a petitioner must establish both prongs of the

test to prevail on a claim of ineffective assistance of counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim.” *Henley*, 960 S.W.2d at 580.

As noted above, this Court will afford the post-conviction court’s factual findings a presumption of correctness, rendering them conclusive on appeal unless the record preponderates against the court’s findings. *See id.* at 578. However, our supreme court has “determined that issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact . . . ; thus, [appellate] review of [these issues] is *de novo*” with no presumption of correctness. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999).

Furthermore, on claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight. *See Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). This Court may not second-guess a reasonably-based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. *See id.* However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *See Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

Petitioner specifically argues that his trial counsel was ineffective for (1) failing to inform Petitioner as to the nature and consequences of his guilty plea; (2) failing to adequately investigate the facts of Petitioner’s case; (3) failing to adequately consult with Petitioner prior to pleading guilty; and (4) failing to have Petitioner undergo mental health screening prior to pleading.

Once a guilty plea has been entered, effectiveness of counsel is relevant only to the extent that it affects the voluntariness of the plea. In this respect, such claims of ineffective assistance necessarily implicate the principle that guilty pleas be voluntarily and intelligently made. *See Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (citing *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)). As stated above, in order to successfully challenge the effectiveness of counsel, the petitioner must demonstrate that counsel’s representation fell below the range of competence demanded of attorneys in criminal cases. *See Baxter*, 523 S.W.2d at 936. Under *Strickland v. Washington*, 466 U.S. 668, 694 (1984), the petitioner must establish: (1) deficient representation; and (2) prejudice resulting from the deficiency. However, in the context of a guilty plea, to satisfy the second prong of *Strickland*, the petitioner must show that “there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill*, 474 U.S. at 59; *see also Walton v. State*, 966 S.W.2d 54, 55 (Tenn. Crim. App. 1997).

When analyzing a guilty plea, we look to the federal standard announced in *Boykin v. Alabama*, 395 U.S. 238 (1969), and the State standard set out in *State v. Mackey*, 553 S.W.2d 337 (Tenn. 1977). *State v. Pettus*, 986 S.W.2d 540, 542 (Tenn. 1999). In *Boykin*, the United States Supreme Court held that there must be an affirmative showing in the trial court that a guilty plea was voluntarily and knowingly given before it can be accepted. *Boykin*, 395 U.S. at 242. Similarly, our Tennessee Supreme Court in *Mackey* required an affirmative showing of a voluntary and knowing

guilty plea, namely, that the defendant has been made aware of the significant consequences of such a plea. *Pettus*, 986 S.W.2d at 542.

A plea is not “voluntary” if it results from ignorance, misunderstanding, coercion, inducements, or threats. *Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993). The trial court must determine if the guilty plea is “knowing” by questioning the defendant to make sure he fully understands the plea and its consequences. *Pettus*, 986 S.W.2d at 542; *Blankenship*, 858 S.W.2d at 904.

The post-conviction court found that Petitioner did not prove his allegations by clear and convincing evidence. This conclusion is supported by the great preponderance of the evidence. Petitioner argues that his counsel failed to inform him as to the nature and consequences of his guilty plea. However, Petitioner’s guilty plea colloquy, which is included in the record, demonstrates that he agreed that he himself had read the plea agreement, counsel had fully explained his guilty plea and that the trial court again explained both the charges and the corresponding sentences. At the post-conviction hearing, Petitioner admitted on cross-examination that trial counsel had gone over the plea agreement and the elements of the charges. He agreed that trial counsel had discussed his options with him.

Petitioner also argues that trial counsel did not adequately consult with Petitioner prior to the guilty plea and did not adequately investigate the facts of Petitioner’s case. However, this assertion is not borne out by the record. At the post-conviction hearing, Petitioner admitted that trial counsel met with him to review his interview with the police and to go over the plea agreement. Trial counsel testified that she met with Petitioner several times. Petitioner also admitted that he confessed to the crime in a statement to the police. Trial counsel stated that she read statements from several people to whom Petitioner had confessed, before he spoke with the police, and she reviewed Petitioner’s interview with the police and the medical report.

Petitioner’s final argument is that his trial counsel was ineffective because she failed to have Petitioner undergo mental health screenings before pleading guilty. Trial counsel testified that at her initial meeting with Petitioner, she found him to be despondent. However, at the preliminary hearing he was alert and was able to speak cogently with counsel regarding his case. She believed him to be competent throughout her representation of him. She also testified that it was her practice to obtain a mental evaluation if she believed that it was even a close call as to a defendant’s competency. Petitioner had no diagnosis prior to his arrest. Petitioner was unable to testify as to what his diagnosis actually was. In addition, he did not bring to the post-conviction hearing any sort of medical expert to testify as to a mental health diagnosis.

Petitioner did not prove his allegations by clear and convincing evidence with regard to any of his allegations. Petitioner has not proven that services rendered by his counsel were insufficient. He has likewise not proven that he would have gone to trial instead of pleading guilty, as required for him to be successful on his petition. The record amply demonstrates that Petitioner received the effective assistance of counsel.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the post-conviction court.

JERRY L. SMITH, JUDGE